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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 888

STORER BROADCASTING COMPANY, DETROIT FIRE & MARINE INSURANCE COMPANY, and ASSOCIATED AVIATION UNDERWRITERS,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit.

A.

THE OPINION SOUGHT TO BE REVIEWED.

This is a Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States

District Court for the Northern District of Alabama in favor of the United States of America. The opinion of the United States Court of Appeals as of this date has not been published in the Federal Reporter; however, a copy of the opinion is attached to this Petition as Appendix 1. The opinion of the District Court is to be found in the record on pages 306 to 310.

A Petition for Writ of Certiorari involving the same question presented herein is understood to be before the Supreme Court in Mabel Prager, etc., et als., Petitioners, v. United States of America, also up from the Fifth Circuit.

B.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the United States Court of Appeals sought to be reviewed was rendered on January 9, 1958, and entry of the same was made the same date.

The jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law which has not been, but should be, settled by this Court, and in doing so has rendered a decision in conflict with the reasoning of the United States Court of Appeals for the Third Circuit expressed by dicta in the case of **O'Toole et al. v. United States et al.**, 206 Fed. (2) 912, involving the same matter as the instant case.

C.

THE QUESTION PRESENTED FOR REVIEW.

The sole question presented herein is whether a member of the National Guard of a State who has not been called to the active service of the United States is foreclosed from being considered an "employee of the Government" within the meaning of the Federal Tort Claims Act without regard to the doctrine of respondeat superior of the forum in which he negligently damages another. If a third party is negligently injured by a member of the State National Guard while operating a conveyance which is the property of the United States, and under circumstances whereby the guardsman is directed, controlled and paid by the Federal Government, is the third person to be denied a right of recovery under the Statute merely because the tort-feasor at the time of the accident has not been called into the active service of the United States? Stated another way, we seek herein to determine from this Court if a liberal construction of § 2674 of Title 28 of the U. S. Code does not permit recovery by a claimant under the Act for the negligence of a State Guardsman who has not been called into the active service of the Federal Government when by a preponderance of the evidence the United States in the status of a "private individual" would be liable under the law of Agency of the State in which the accident occurred.

D.

STATUTES INVOLVED.

Chapter 171 of Title 28 of the United States Code Annotated deals with tort claims procedure. Under § 2671 relating to definitions it is stated:

> "'Federal Agency' includes the executive departments and independent establishment of the United

States, and corporations primarily acting as, instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"'Employee of the Government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

§ 2674 of Title 28 provides:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Title 32 of the United States Code Annotated entitled "National Guard" contains numerous sections relating to the composition, organization and control generally of the State National Guards by the Federal Government. A resume of the pertinent provisions indicative of the supervision of the United States over a guardsman whether in the active service or not is appended to this petition as Appendix 2.

E.

STATEMENT OF THE CASE.

This case came to the United States Court of Appeals for the Fifth Circuit on an appeal by the petitioners from an adverse judgment rendered by the District Court of the United States for the Northern District of Alabama on January 14, 1957, in a suit originally filed by the petitioners

as plaintiffs in said District Court under the jurisdiction conferred by the Statute commonly cited as the Federal Tort Claims Act. The original complaint filed on January 31, 1955, was never amended and asserted claim against the United States of America by averring that on February 5, 1954, a DeHaviland Dove aircraft owned by the plaintiff Storer Broadcasting Company, and insured against loss by the plaintiffs, Detroit Fire & Marine Insurance Company and Associated Aviation Underwriters, was damaged to the extent of $130,000.00 by reason of the negligent operation of an Alabama Air National Guard F-51 aircraft owned by the defendant, The United States of America, and operated by a servant, agent or employee of the said defendant who had been permitted the use of said aircraft by the United States and who was operating the same on a mission for its benefit (R. pp. 1 through 4). Other averments in the complaint were to the effect that the circumstances by which the said DeHaviland Dove aircraft was damaged and destroyed were such that the persons responsible for the operation of the Air National Guard F-51, if they were private persons, would be liable to the plaintiffs for their damage and also that under the laws of the State of Alabama where the said accident occurred the United States of America as owners of the Air National Guard F-51 aircraft would be liable to the plaintiffs for their damages if the said United States of America were a private person.

On trial date, October 8, 1956, a stipulation between the parties was filed which, in effect, agreed that the plaintiffs' damages amounted to $99,248.70, and that the plaintiff insurors, as subrogees of Storer Broadcasting Company, had a right to maintain the action by virtue of subrogation conditions in the policy issued to Storer Broadcasting Company by them (R. pp. 28 through 32). The trial ensued and was concluded on the same day, with the court reserving its ruling upon the motion of the defendant for a

judgment until its order of January 14, 1957 (R. pp. 306 through 310).

On February 13, 1957, the plaintiffs filed their notice of appeal, duly designated the contents of the record, prepared and filed briefs and argued the case orally before the United States Court of Appeals for the Fifth Circuit on October 9, 1957. Judgment of the Fifth Circuit Court of Appeals was rendered on January 9th, 1958, and as has been stated a copy of the opinion is attached to this petition as Appendix 1.

The accident made the basis of the suit occurred on February 5, 1954, when an F-51 type aircraft owned by the United States and loaned to the Alabama Air National Guard collided with a DeHaviland Dove airplane which was parked on the ramp of the Municipal Airport in Birmingham, Alabama. The Army plane was being operated by Major Stuart H. Daigneau in the course of his landing after a thirty-minute flight from Montgomery to Birmingham on a training mission, which the evidence adduced at the trial showed to be a part of the National Guard program.

There was no conflict in the testimony concerning the status of Major Daigneau or the arrangements between him, the Alabama Air National Guard, the U. S. Air Force, or the Federal Agency known as the National Guard Bureau. All of the testimony relating to the question of agency, with the exception of that given by Captain Henry Fillingim and Major Stuart Daigneau himself, was either by deposition or in the form of the defendant's sworn answers to plaintiffs' interrogatories, or affidavits in support of motion for summary judgment. In the latter connection, Winston P. Wilson, Brigadier General, United States Air Force, submitted an affidavit that on the date of the accident the Alabama Air National Guard was not in the

Federal Service, and he further contended that Major Daigneau was not on active duty with the U. S. Air Force at that time. He did admit that Major Daigneau was flying the airplane in question on a training mission (R. pp. 13-14).

In the defendant's answers to plaintiffs' interrogatories it was admitted that the airplane was the property of the United States of America on the occasion of the accident, and that it had been issued to the State of Alabama for field service and training use by the Alabama Air National Guard. The flight on which Major Daigneau was embarked at the time of the collision was described as a "routine training flight" and it was stated that such training flights could be considered proficiency flights. The answers also stated that Major Daigneau was a member of a federally recognized Air National Guard Unit, and that in order for such units to be so recognized the members thereof must remain on flying status so as to be eligible to receive flight pay for their forty-eight training periods per year, and that they were required by the Air Force to maintain certain standards of proficiency (R. pp. 15-16).

The testimony of Captain Harry M. Barnes, Jr., was taken by deposition and introduced into evidence as Plaintiffs' Exhibit 4 (R. pp. 172 through 204). This officer on February 5, 1954, was the acting Base Commander of the Alabama Air National Guard at Dannelly Field, Montgomery, Alabama, and was also acting Squadron Commander with his duties being those of supervising training personnel (R. p. 173). He stated he was acquainted with Major Daigneau, who as an officer in the Alabama Air National Guard, was assigned to the 106th Tactical Reconnaissance Squadron (R. p. 174). The witness testified that under Air National Guard regulations Major Daigneau was required to get a certain amount of efficiency flying to keep familiar with the airplane and in this specific case it

amounted to 100 hours a year (R. p. 175). He said he was familiar with the fact that Major Daigneau was involved in an accident while on a flight on February 5, 1954, which had originated from Dannelly Field, and which he termed to be a proficiency flight.

Captain Barnes stated that before Major Daigneau left Dannelly Field he was required to obtain a clearance from Flight Service, which is a branch of the U. S. Air Force that is charged with the movement or monitoring of airplanes. He explained that Major Daigneau could not obtain a clearance for cross-country flying from Dannelly Field as the Alabama Air National Guard does not have that authority delegated to them (R. pp. 176-177). This clearance was obtained from the Air Force Flight Service Center at Maxwell Field, and Captain Barnes stated that in the case of the Air National Guard at Dannelly Field the pilots had to have flight service approval prior to taking off.

Upon being questioned concerning agreements or regulations existing between the U. S. Air Force and the Alabama Air National Guard, whereby a record of the proficiency flights made by the Alabama guardsmen was transmitted to the U. S. Air Force, the witness replied that certain reports were made to the National Guard Bureau, and that an individual report of each guardsman's time is forwarded to the National Guard Bureau in Washington, D. C., from which it goes to the Norton Air Force Base (R. pp. 179-180). He stated that according to his knowledge Continental Air Command, a branch of the U. S. Air Force, more or less supervises the Air National Guard training program through their various and numbered air forces, and monitor the program of the Air National Guard to see that the training parallels that of the Air Force (R. p. 182). He said that the Continental Air Command is charged with supervising all reserve force training, in-

cluding Air National Guard, and that his unit received, through the National Guard Bureau, certain memoranda from Continental Air Command (R. p. 183). He stated that Continental Air Command stationed one officer and four or five airmen at Dannelly Field to help carry out the program of training and described to some extent the control exercised over the Air National guardsmen located there (R. p. 188).

The witness also stated that on occasion of accidents involving airplanes, such as the F-51 flown by Major Daigneau, they were in some instances sent to Mobile to the Air Materiel Command, a component of the U. S. Air Force, for repair (R. pp. 189-190). He further stated that there was an accident report completed which he was reasonably sure ended up at the Norton Air Force Base where the headquarters of the Safety Division of the U. S. Air Force is located (R. p. 190).

Barnes was interrogated as to how Major Daigneau was paid in the Air National Guard during the period around February 5, 1954, when the accident made the basis of the suit occurred, and answered that all National Guardsmen in this area are paid from Dobbins Air Force Base in the form of a United States Treasury check (R. pp. 191 to 193). Referring to Major Daigneau's specific pay for the 5th of February, 1954, the witness stated that he could not actually say there was any specific pay concerned there, pointing out that they were required, in order to qualify for flying pay, to get two hours a month flying time, and that the pay is the same whether the pilot flies the qualified two hours or forty hours (R. p. 192).

Lt. Col. Joseph R. Waters testified by deposition, offered as Plaintiffs' Exhibit 3 (R. pp. 149 through 171). He identified himself as being an Air Advisor assigned by the U. S. Air Force to the Alabama Air National Guard Unit at Dannelly Field, Montgomery, Alabama, on February 5,

1954, when the accident made the basis of the suit occurred, and described his status with the U. S. Air Force as being that of a regular officer (R. p. 150).

The witness was asked to describe what regulations, if any, the U. S. Air Force had concerning the type of proficiency flight by a guardsman connected with his Air National Guard unit, such as the one on which Major Daigneau was embarked on the occasion of the accident, and replied that there were certain Air Force regulations and agencies utilized in order to complete such a flight. He said that, for example, the National Guard Bureau has an agreement with the Air Force that it would direct the State Guard unit to conform to certain safety flight regulations and agencies of the Air Force at any time they are participating in cross-country type flights (R. p. 153). In describing the procedure employed by an Air National Guardsman before embarking on a cross-country flight, the witness stated that before he takes off he must first get a clearance on a DD Form 175, with said clearance emanating from Flight Service, which is a unit of the United States Air Force (R. p. 154). He further admitted that it was against United States Air Force regulations for a cross-country flight to originate from Dannelly Field without Flight Service clearance having been obtained (R. p. 156).

Upon being interrogated as to how the planes used by the Air National Guard at Montgomery, Alabama, were obtained, Colonel Waters stated that to the best of his knowledge they were all loaned to the Air National Guard by the United States Air Force (R. p. 157), and that the Continental Air Command was charged with the responsibility of inspecting the National Guard annually (R. p. 158). He admitted that he made progress reports to superior officers concerning whether or not the Alabama Air National Guard was obtaining a certain efficiency in

its training (R. p. 159). Upon being asked as to what penalties, if any, were imposed on the Air National Guard by the United States Air Force if training specifications were not being met, the witness replied that the National Guard Bureau has the right to withdraw Federal recognition entirely from a State Unit, in which event the benefits that are derived by Federal recognition to an Air National Guard Unit would be withdrawn (R. pp. 160-161).

Upon being questioned concerning the remuneration received by Air National Guardsmen of flying status for the time they spend flying, Colonel Waters answered that in certifying the payroll for a guardsman a check is made to ascertain that the man has properly qualified for flying pay. Upon being asked what determines the qualifications the flyer has to meet, he replied that the National Guard Bureau sets up the requirements which are contained in their regulations (R. p. 163). He admitted that he certified as to compliance with these regulations by individuals involved, after which the Guardsman ultimately received a pay check from the United States Air Force at Dobbins Field, mailed directly to the individual (R. p. 164). He identified the requirements laid down regarding proficiency flights by the National Guard Bureau to State Air National Guardsmen as being primarily the same as those required by Air Force personnel or the Air Force regulation concerning minimum proficiency (R. p. 164).

The testimony of Lt. Colonel Wm. M. Blatt was taken by deposition and offered into evidence as the Plaintiffs' Exhibit 5 (R. pp. 205 through 255). The deposition was taken at the National Guard Bureau, Pentagon Building, Washington, D. C., at which time Colonel Blatt identified himself as being the Chief Legal Officer connected with the National Guard Bureau, which he described as being the channel of communications between the Departments of the Army and the Air Force in the several states and

dealing with the military authorities of the several states (R. pp. 207-208). **He further explained that the National Guard Bureau is composed of officers of the Army or Air Force on active duty, and that the Bureau is primarily concerned with the administration of the federally recognized National Guard Units not in the active federal service (R. pp. 210 and 211). (Emphasis supplied.)**

Upon being questioned as to the status of an Air National Guardsman in a State unit, Colonel Blatt stated that under regulations promulgated by the Chief of the National Guard Bureau, and approved by the Secretary of the Air Force, in order to become a member of the Air National Guard of the United States, an individual must first be appointed as an officer in the National Guard of a State by the Governor or other proper military authority, in accordance with the State Law as provided in the Constitution, whereupon, the State orders that officer before what is known as a Federal Recognition Board which examines the officer as to his qualifications, which said qualifications are prescribed in Air National Guard regulations. He stated that if the Federal Recognition Board finds the individual to be qualified, then a recommendation is made to the Chief of the National Guard Bureau that the individual be granted Federal recognition. The Chief of the National Guard Bureau concurrently advises the Secretary of the Air Force that Federal recognition has been granted. The Secretary of the Air Force then, upon ascertaining that the man is in all respects qualified, will tender him an appointment as a reserve of the U. S. Air Force in the same grade in which he has been federally recognized. The individual then accepts that appointment and as of that moment he becomes a member of the Air National Guard of the United States. In order to be a member of the Air National Guard of the United States, as is provided in the Armed Forces Reserve Act, an individual must be a member of the federally recognized National Guard and be a reserve of the U. S. Air Force in the same grade.

The witness described such an individual who has completed all of the aforementioned steps as concurrently occupying a dual status, one as a member of the federally recognized, organized militia of the state, and, secondly, being a reserve officer of the U. S. Air Force, and stated that by virtue of being a reserve officer of the U. S. Air Force and in the federally recognized National Guard, such an individual is a member of the Air National Guard of the United States (R. pp. 212-213). Further explaining the status of an Air National Guardsman, Colonel Blatt stated that in order to draw pay allowances, and to receive other benefits under Federal Law, he must first be federally recognized by the National Guard Bureau, by the Secretary of the Army or the Secretary of the Air Force, acting through the Bureau (R. pp. 215-216).

The witness checked the records of the National Guard Bureau on file in the Pentagon Building in Washington, D. C., and found that special order No. 66, dated April, 1953, read:

> "By direction of the Secretary Air Force, announcement is made of the extension of Federal recognition to the following Air National Guard Officer in the grade, State, and on the date indicated, such officer having qualified under § 74 and § 75, National Defense Act, as amended."

and then indicated that Major Stuart H. Daigneau was included in said order along with other officers, and that the date of Federal recognition was established as of 6 March, 1953 (R. p. 216). Further concerning the status of Major Daigneau as a federally recognized Air National Guardsman, the witness stated that if he were performing duty with or without pay as provided in the National Defense Act and was injured in the line of duty, he would be entitled to the benefits provided by Public Law 108, 81st Congress, which states that he shall be in all respects entitled

to receive the same pensions, compensation, death gratuity, retirement pay, hospital benefits, and pay, and allowances, as are now or may hereafter be provided by law and regulation for officers and enlisted men of corresponding grade and length of service of the regular Army. He stated this was also applicable to the Air National Guard, and that they would receive the same benefits which an officer of the Regular Air Force would receive (R. pp. 216-217).

Again checking the record, Colonel Blatt read from a Department of the Air Force letter Order M-813, dated 19 April, 1953, to the effect that on April 29, 1953, Stuart Daigneau was promoted as a reserve of the Air Force in the grade of Major, and was, therefore, from and after 19 April, 1953, a federally recognized Major, Air National Guard and Major Reserve of the Air Force. He further admitted that in this status in his training with the Alabama Air National Guard, Major Daigneau was earning retirement points (R. pp. 220-221).

Under further examination the Chief Legal Officer for the National Guard Bureau stated that the Bureau has regulations which are handed down to the National Guard of the respective States wih reference to its operation, answering that the general body of such regulations are known as Air National Guard Regulations, and describing them as being promulgated by authority of the Secretary of the Air Force, and setting forth the conditions upon which pay is to be received, medical benefits are to be received, the handling of Federal property issued, and as generally relating to the training of the Air National Guard (R. p. 222). Plaintiffs' Exhibit 1 to the deposition of Colonel Blatt was then introduced as containing a list of applicable administrative publications which applied to the Air National Guard in the various States. He stated that from his personal knowledge of the regulations he knew they were in force and effect, more or less, back in February of 1954,

explaining, however, that they were changed from time to time (R. p. 225).

Colonel Blatt was asked whether or not the National Guard Bureau exercised any regulation or supervision, or if it had any requirements concerning the rights to advancement of an Air National Guardsman in a State Unit, to which he replied: "Promotion of members of the federally recognized National Guard, or, rather, Federal recognition of officers depends upon such things as time and grade, completion of different types of advance training and similar conditions which are imposed by Air National Guard regulations, and similarly promotion as reserves of the Air Force is likewise dependent upon regulations and law, Federal" (R. p. 230).

In response to the specific question:

> "Q. Can the National Guard Bureau have anything to do with the discharge or firing of an Alabama Air National Guard?"

Colonel Blatt, the legal adviser and chief legal officer of the National Guard Bureau, answered:

> "A. The National Guard Bureau could, for the causes enumerated, withdraw the recognition of a member of the Alabama Air National Guard which would terminate his rights to receive any benefits under Federal law."

He then further described the regulations as being promulgated in the name of the Secretary of the Air Force, and admitted that even though an Air National Guardsman obtains an appointment from the State of Alabama, the National Guard Bureau does have within its regulatory processes the right to prevent him from getting on a pay basis by the expedient of refusing to grant Federal recog-

nition to the individual, or if he already has such recognition, by withdrawing it (R. p. 231).

Further describing the control of the National Guard Bureau over the State Guard Units, Colonel Blatt stated that there were numerous field inspections made by the Air National Guard representatives, reports of same being forwarded to the National Guard Bureau (R. p. 232).

The witness admitted also that fuel which is consumed in the operation of an aircraft as authorized or provided by Federal Law is provided by the United States Government (R. p. 234).

At the conclusion of his testimony, Colonel Blatt stated that at the time of the accident Major Daigneau was recognized as a State Militiaman and also as an Air Force Reserve Officer (R. p. 254). Specifically, he made the following statement concerning Major Daigneau:

> "Since the records of the National Guard Bureau indicate that the man had been given both Federal recognition and had been appointed as a reserve of the Air Force in the identical grade, we, of course, not only considered him, but he was both a member of the federally recognized Air National Guard and a reserve of the Air Force, neither of the statutes having been terminated" (R. p. 254).

Another witness offered by the plaintiffs was Colonel Louis P. Turner, U. S. A. F., whose deposition was taken at the Pentagon Headquarters of the National Guard Bureau in Washington, D. C., and introduced at the trial as a portion of Plaintiff's Exhibit No. 5 (R. pp. 256 through 296).

The position of Colonel Turner at the time of the taking of his testimony was Executive Officer in the Air Force

Division of the National Guard Bureau (R. p. 257). From records within his custody concerning the accident sued upon and the status of Major Daigneau with the United States Air Force on February 5, 1954, the witness testified:

> "From the records I have been able to review, Major Daigneau was a federally recognized Air National Guard Officer in the grade of a Major" (R. p. 259).

Concerning the flight on which Major Daigneau was involved when the accident occurred on February 5, 1954, the witness stated that the records indicated he was on an inactive duty training status with the 106 Tactical Reconnaissance Squadron, and on the occasion made the basis of the suit he was engaged in a training activity, **with the purpose of the training flight on which he was embarked being to prepare or to train the individual to perform a mission as a reserve of the Air Force in time of emergency** (R. pp. 259-260). (Emphasis supplied.)

In response to the question as to whether or not the United States Air Force had an interest, in February of 1954, in the flying proficiency of Major Stuart Daigneau, Colonel Turner stated that it did as a reserve of the Air Force activity.

The witness, upon being questioned concerning the regulations imposed by the Air Force upon the State Air National Guard Units, identified them as being rules with which the individual must comply to maintain his flight status with the Air Force Reserve (R. p. 265).

Upon being asked about the fueling requirement of the pieces of aircraft for use on training flights, upon such as Major Daigneau was engaged on the occasion of the accident made the basis of the suit, Colonel Turner stated that the fuel was furnished on contract, with the said con-

tract being promulgated by the United States Air Force, and the money incidental to payment for the fuel being programmed by the National Guard Bureau and being allocated by Congress for this purpose (R. p. 267).

Colonel Turner testified that he was familiar with the fact that numerous regulations are set out and handed down to the State Air National Guard Units, with the regulations in some instances being promulgated by the United States Air Force and made applicable to the Air National Guard by the National Guard Bureau. He described a DD Form 175 as being a clearance form which Major Daigneau had to get from someone connected with the Air Force before he could take off from the field at Montgomery (R. pp. 270-271).

Colonel Turner was specifically asked:

> "Q. At the time of Major Daigneau's accident was there a provision or regulation of the Air National Guard in force and effect concerning discharge of officer personnel?",

to which he replied:

> "A. Yes, there was."

He was then asked:

> "Q. Did this regulation apply to him on the occasion of Major Daigneau's accident?",

to which the witness answered:

> "A. Yes, it did."

The regulation in question, namely, ANGR 36-05, dated 22 September, 1953, was then introduced into evidence as Plaintiffs' Exhibit No. 8 to the deposition of Colonel Turner (R. p. 279).

Colonel Turner was questioned concerning regulations involving the termination, withdrawal or revocation of Federal recognition of office personnel in force and effect at the time of the occurrence of the accident made the basis of the suit and these were made available as exhibits for the court's inspection. They are illustrative of the vast amount of supervision, control, and regulation imposed on a State Air National Guardsman by the Federal Government on a routine proficiency flight, such as that upon which Major Daigneau was engaged at the time of the accident involved in this litigation.

Captain Henry Fillingim was presented at the trial by the defendant (R. pp. 60 through 82, and 106 through 121). He identified himself as being Flight Training Supervisor with the 160th Tactical Reconnaissance Squadron at Montgomery, Alabama, and as having held the position on February 5, 1954, of Assistant Operations Officer for his squadron, which is a part of the Alabama Air National Guard (R. pp. 60-61). He stated that at that time the orders came from the 117th Tactical Group and their orders came from the 117th Tactical Wing, whose orders came from the State Military Department, **and the military orders came from the National Guard Bureau** (R. p. 61). (Emphasis supplied.) More specifically, he stated that the orders received by the Alabama Air National Guard came from the National Guard Bureau located in Washington, D. C. (R. p. 62). He admitted that these orders had reference to the training of Guard personnel, such as Major Daigneau (R. p. 63).

Captain Fillingim, upon being questioned as to what he had to do, if anything, with Major Daigneau's proficiency flight, answered that he was one of what was called "instructor pilots" with the squadron, and checked out the people and the type of aircraft they had. He stated that he had not himself checked out Major Daigneau, but

that this had been done by Major Hamby, who was with Squadron Operations at that time (R. p. 64). He identified both himself and Major Hamby as being United States Air Force Officers in the Reserve, and admitted that the pay received by both of them came from the Dobbins Air Force Base in Georgia, and that they also got a check from Maxwell Field from the Air Force (R. p. 65). Upon being asked what control or supervision, if any, Major Hamby had over Major Daigneau on February 5, 1954, the witness answered that he was the operations officer and was in charge of flying training of the squadron, and that he, Captain Fillingim, was Major Hamby's assistant (R. p. 65).

Upon being asked to explain to the Court the procedure employed by Major Daigneau in getting the plane in Montgomery and flying to Birmingham on the occasion of the accident, the witness replied that Major Daigneau requested the airplane from Major Hamby, who was the operations officer, and that he, in turn, approved the flight (R. p. 66). He further described Major Daigneau as having to obtain flight clearance through the Military Flight Service, with the center for this area being located at Maxwell Field, and admitted that this was not true with respect to a civilian plane leaving Dannelly Field (R. pp. 66-67). Further explaining flight clearance procedure for Major Daigneau, the witness stated that after he landed he would return his flight clearance to Operations, and that they would close the flight plan with Military Flight Service. He stated that the Base of Operations, in turn, notified Flight Service that he is landed and on the ground at that installation. He further testified: **"In other words, we wash control of him then"** (R. pp. 67-68). (Emphasis supplied.)

The witness stated that Major Daigneau, on February 5, 1954, occupied a **dual role** as United States Air Force Reserve Officer, as well as an Alabama National Guardsman

(R. p. 68). In response to interrogation on the subject, the witness admitted that in his training of officers in the category of Major Daigneau on the occasion of the accident on February 5, 1954, that he, as an Army Air Force Reserve Officer, paid to train Major Daigneau, was furnished with numerous regulations to which Major Daigneau was subjected, and that these regulations came down through Military channels from the National Guard Bureau and from the United States Air Force (R. pp. 72-73).

In reply to a question from the Court:

> "From whom do the personnel in Alabama National Guard get their orders as to where they must be or what they must do or where they should go?"

the witness answered:

> "They get them from the Guard Bureau and they come down through channels" (R. pp. 115-116).

He then explained that the Guard Bureau to which he referred was the agency in Washington known as the National Guard Bureau (R. p. 117).

Major Daigneau was called by the defendant during the course of the trial and identified himself as the pilot involved in the accident on February 5, 1954, which occurred at the Birmingham Municipal Airport while he was flying an F-51 airplane, and while he was attached to the 117th Tactical Wing of the Alabama Air National Guard. He stated that his purpose in making the flight in which he was engaged at the time of the accident was for proficiency (R. p. 85).

On cross-examination the witness stated that before he became a member of the Alabama Air National Guard he was given a physical examination at the Maxwell Air Force

Base in Montgomery by flight surgeons connected with the U. S. Air Force (R. p. 90). He admitted that before he got his clearance to take off from Dannelly Field it had to be cleared through Flight Service at Maxwell Field (R. p. 91). He stated that his pay checks for service in the National Guard came from Dobbins Air Force Base in the form of a Federal Government check (R. p. 92). Upon being asked what connection, if any, the Continental Air Command had with the proficiency training of pilots in his status in 1954, he replied that they had an Air National Guard regulation which lists the required minimums for proficiency flying which he had to meet to maintain his rating (R. p. 92).

The witness was asked about his experience in flying the F-51 prior to the accident on February 5, 1954, and indicated he had flown this type of aircraft ten or fifteen hours concentrated in four or five flights, and that his checkup was under the supervision of training personnel at Dannelly Field in the category of Captain Fillingim (R. pp. 93-94). He further stated that he was required to study technical orders before he was checked out in the F-51 and that these were contained in an Air Force Manual. **He also stated that all of the regulations issued to him as a member of the Air National Guard came directly from the Air National Guard or from the National Guard Bureau** (R. p. 95).

The remainder of the testimony adduced at the trial was in the form of exhibits which are either included in the record or covered by the order of the Court, dated April 24, 1956, transmitting the original exhibits to the Appellate Court (R. p. 313). These papers include numerous regulations of the Air National Guard Bureau and the Air Force concerning National Guardsmen. **In short, the evidence shows without dispute that every movement of Major Daigneau on the occasion of the accident made the basis**

of the suit was controlled and regulated either by the National Guard Bureau or the U. S. Air Force through the medium of supervisory personnel and written regulations. His pay came from the Federal Government, and the right to withdraw Federal recognition retained by the United States was shown by the evidence as being tantamount to the right to discharge the guardsman inasmuch as the withdrawal of the Federal recognition would have the effect of taking him off of the pay status.

F.

REASONS RELIED ON FOR THE ALLOWANCE OF A WRIT.

The question as to whether or not under all the circumstances the United States can escape liability for the acts of a National Guardsman by merely showing that on the occasion of the accident complained of he was not in the "active service" of some branch of the Armed Forces has never been passed upon by this Court. To our knowledge, the instant case and that of United States v. Prager, as yet unreported, but also decided by the Court of Appeals for the Fifth Circuit on January 9, 1958, and presently before this Court on petition for writ of certiorari, are the only instances wherein the plaintiffs during the course of the trial in the District Court introduced evidence showing supervision and control over the National Guardsman, such as would be sufficient to hold a private individual responsible for his conduct under the rules of respondeat superior obtaining in the particular State where the accident occurred. All cases previously decided appear to be ones wherein motions for summary judgment were granted to the United States on a showing that at the time of the accident the guardsman involved was not "in the active service" of the United States.

There is, of course, no presumption of agency which arises against the United States in such cases, and without proof of the supervision and control over the guardsman, as was shown in the instant case and in the Prager suit, the tribunals which have tried such cases in the past were entitled to make such rulings against the plaintiff who sued. It is our thought, however, that this has caused a misconception of the law to be engrafted upon the Federal Tort Claims Act which now threatens to establish an exception to the rule of liberal construction approved by this Court in **United States v. Yellow Cab**, 340 U. S. 543, 95 L. Ed. 523. It is submitted that a question of substantial importance involving a Federal Statute remains unanswered and only this Court can put finally to rest the conjecture as to whether it is possible or not by a showing of control and supervision to hold the United States liable under the Federal Tort Claims Act for the wrongdoing of its guardsman who on the occasion complained of is not in the active service.

Colonel Blatt, the legal officer for the National Guard Bureau, testified that under Public Law 179 of the 83rd Congress there was appropriated for the Air National Guard alone a total sum of $147,100,000.00 for the fiscal year ending June 30, 1954 (R. p. 256). We do not have figures which indicate the scope of the entire National Guard program, including the ground forces but we are sure this Court will take judicial recognition of the fact that it is tremendous, and further that virtually all of the cost of the same is borne by the Federal Government. It is of impelling urgency that this Court more clearly designate the extent and manner in which liability under the Federal Tort Claims Act can be imposed on the United States for injury and damage caused to citizens of this country by prosecution of the National Guard movement.

Chief Judge Biggs, speaking for the Third Circuit, in the case of O'Toole et al. v. United States, observed:

"We think that if a private individual or organization in Delaware had possessed the degree of control over Harrington in the M-4 tractor—as to employment and discharge, discipline, direction and ownership—which has been given by Statute to Federal authority, there could be no question but that the individual or organization would be held responsible for any tort committed by Harrington in driving the tractor."

In the O'Toole case it was ruled that Harrington was an employee of the United States within the purview of the Federal Tort Claims Act, with the Court pointing out that the guard for the District of Columbia, of which Harrington was a member, has a little different setup from the situation that obtains with reference to the National Guard Units in the various States. The Court, in its opinion, however, stated:

"Our holding rests upon the degree of supervision and control exercised over the District Guard in peace time by Federal authorities."

We submit that the rationale of the O'Toole case is of such nature as to constitute a divergence of opinion and a conflict with the decisions of the Court of Appeals for the Fifth Circuit, and sufficient basis is thereby accorded for review by this Court.

During the brief history of the Federal Tort Claims Act there has been, at least in the early years of its existence, a tug of war between the various courts writing on the subject as to whether the Act should be liberally or strictly construed. By its decision in **United States v. Yellow Cab Company**, this court has now firmly established the proposition that the Federal Tort Claims Act is to be interpreted in such a manner as to give real effect to the purposes and intendments of the Act designed to relieve the harsh rule of governmental immunity. The disposition to expand

the coverage of the Act and to circumscribe its limiting exceptions is further reflected in **United States v. Union Trust Company**, 350 U. S. 907, 76 Sup. Ct. 192. It is submitted that if this Court allows the judgments of the Circuit Court of Appeals for the Fifth Circuit in the instant case and in United States v. Prager and the authorities followed therein to stand up, a withdrawal of the recognized purpose of the Federal Tort Claims Act will have been accomplished and the general trend towards increasing the scope of the waiver by the United States of its sovereign immunity from suit will have been terminated. As was said by the Court in **United States v. Yellow Cab Company**, supra:

> "It is inconsistent to whittle it (Federal Tort Claims Act) by refinements."

In determining liability under the Federal Tort Claims Act the responsibility of the United States must be measured by the same rule of respondeat superior as would apply to a private person in the State where the accident sued upon occurred. Such appears to be the conclusion of the Supreme Court in **Williams v. United States**, 350 U. S. 857, 76 Sup. Ct. 100, in which the reach and effect of the Act was extended in keeping with the attitude of the Court expressed in the Yellow Cab case. In **Williams v. United States**, supra, this Court vacated the judgment of the Court of Appeals for the Ninth Circuit, and remanded the case with instructions to apply as controlling the California doctrine of respondeat superior.

In **United States v. Union Trust Company**, supra, it was pointed out that the Government has waived its immunity with respect to the acts and omissions of members of the Armed Forces while **on or off** active duty, so as to be liable for their acts and omissions to the same extent that private employers are held responsible under the State law for the acts and omissions of their employees, and that

this immunity is not defeated merely because of the presence or absence of identical private activity as the broad and just purpose of the Act is to compensate victims of negligence in the conduct of governmental activities in circumstances like unto those in which private persons would be liable. It was suggested that the substantive law of liability would be furnished primarily by Texas decisions inasmuch as the accident sued upon occurred in Houston, Texas. See, also, **Massachusetts Bonding & Insurance Company v. United States**, 352 U. S. 128, 1 L. Ed. (2) 189, 77 Sup. Ct. 186; **Rayonier, Inc., v. United States**, 352 U. S. 315, 1 L. Ed. (2d) 354, 77 Sup. Ct. 374; **Williams v. United States**, 350 U. S. 857, 100 L. Ed. 761, 76 Sup. Ct. 100; and **The Indian Towing Company v. United States**, 350 U. S. 61, 100 L. Ed. 48, 76 Sup. Ct. 122.

As it is obvious by the very terms of the Statute itself and the controlling decisions of this Court hereinabove enumerated that the liability of the United States is to be determined in the manner and to the same extent as a private individual under like circumstances, we advert to the law of agency in the State of Alabama where the accident made the basis of the instant suit occurred. The test for the determination of "whose employee" is outlined by the Supreme Court of Alabama in **U. S. Steel Corporation v. Mathews**, 261 Ala. 120, 73 So. (2d) 239, by calling for an answer to the question:

> "Whose work was the servant doing, and under whose control was he doing it? • • • It is the reserved right of control rather than its actual exercise that furnished the true test of relationship. He is the master who has the supreme choice, control and direction of the servant, whose will the servant represents in the ultimate result and in all its details."

In **Moore-Handley Hardware Company v. Williams**, 238 Ala. 189, 189 So. 757, the Supreme Court of Alabama stated:

"We have recently approved the statement of the general rule of common law that the relationship of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, **and that such relationship exists where the master has 'choice, control and direction' over the servant**, who represents or acts for the master, not only in the ultimate result of the work, but in all its details. Ex parte Board of School Commissioners of Mobile County, 235 Ala. 82, 178 So. 63. Like expressions are found in Birmingham Post Company v. Sturgeon, 227 Ala. 162, 149 So. 74, where is also approved the statement that '**the essential test** by which to determine whether in doubtful cases the relation between a workman and those for whom he was rendering service was that of an employee or an independent contractor, was not so much dependent upon whether he received wages or whether he was to devote all or a portion of his time to the performance of his specified service, **but was rather dependent upon the extent of control or right of control which the so-called employer was to exercise over its so-called employee.**' (Emphasis supplied.) • • •

"And our Court is committed to the proposition that it is the reserved right of control rather than its actual exercise that furnishes the true test of whether the relation between the parties is that of an independent contractor or of employer and employee—master and servant."

Examination of the facts in the Moore-Handley Hardware Company v. Williams' case, supra, discloses the following circumstances existed:

(1) The defendant conducted a school each morning when the salesmen were given very definite instructions as to their work.

(2) The defendant had the right to discharge McClinton, the alleged servant, at any time it saw fit. (A circumstance to be considered — **Martin v. Republic Steel Company**, 226 Ala. 209, 146 So. 276.) And McClinton fully recognized defendant's right to make suggestions and requests which he sought to carry out.

(3) Defendant knew he was using an automobile, and McClinton says they preferred the salesmen use cars, as they could get about better and produce more business.

(4) McClinton was also required to serve one day each week as floor salesman at defendant's place of business, and it was while he was so serving he met Hotchkiss, a customer of defendant, which meeting resulted in making a sale of a radio, and to whose home McClinton was going to close the trade when the accident occurred.

Let us paraphrase and consider in the instant case the defendant United States as being Moore-Handley Hardware Company and the Alabama Air National Guard pilot, Major Stuart Daigneau, as being the salesman McClinton, referred to in Moore-Handley Hardware Company v. Williams, supra.

(1) Major Daigneau, after becoming an Air National Guardsman, was sent to a school conducted by the United States Air Force for three and one-half months (R. p. 102).

(2) The National Guard Bureau had the right to withdraw Daigneau's Federal recognition at any time it saw fit, thereby terminating his eligibility for any benefits available to him either as a National Guardsman or as a Reserve Air Force Officer, the said withdrawal of recognition being tantamount in its effect to his being discharged from the National Guard.

(3) The United States Air Force and the National Guard Bureau knew that Daigneau was using the airplane which

he was attempting to land when the accident made the basis of the suit occurred. Not only did these Federal Agencies know of his use of the F-51, but a flight service of the Air Force gave him the clearance, without which he could not have removed the plane from Dannelly Field, Montgomery, and both the National Guard Bureau and the United States Air Force prescribed numerous regulations concerning his use of the aircraft, as well as providing the fuel for same.

(4) Daigneau was required by the National Guard Bureau to make routine training flights, such as the one on which he was engaged at the time of the accident made the basis of the suit, in order to maintain a proficiency rating, in the absence of which his right to flying pay would have been terminated and his status as a federally recognized guardsman withdrawn.

"The maxim of respondeat superior," said Lord Chief Justice Best in **Hall v. Smith**, 2 Bing. 150, 130 English Reprints 265, "is bottomed on the principle that he who expects to derive advantage from an act which is done by another for him must answer for any injury a third person may sustain from it." It is thus generally accepted as law in Alabama that where a person does an act for the benefit of another, and under circumstances where he is subject to the control and direction of the person whose mission is being accomplished then the beneficiary and the person in whom the right of supervision and control is vested can be held legally responsible to third persons for injuries caused by the negligence of the actor carrying out the venture of the person benefited, and in whom the right of control is reserved. Colonel Turner, the executive officer in the Air Force Division of the National Guard Bureau, whose deposition was read at the trial, described Major Daigneau on the occasion of the accident on February 5, 1954, as being engaged in a training activity, with

the purpose of the training flight on which he was embarked being to prepare or train the individual to perform a mission as a reserve of the Air Force in time of emergency (R. pp. 259-260).

It cannot be disputed but that Major Daigneau, be he Alabama National Guardsman or United States Air Force Reserve at the time of the accident, was acting for the benefit of the Federal Government and subject in large measure to its direction, supervision and control.

In the trial of the case an avalanche of testimony was offered concerning the numerous rules and regulations imposed by the National Guard Bureau, **a Federal Agency** located in the Pentagon Building, Washington, D. C., on the Alabama Air National Guard Unit, to which Major Daigneau belonged, and also upon Major Daigneau individually. Undisputed proof was made in abundance that every move of the Alabama Air National Guard in the handling of its equipment, in its training of personnel, and the use of the equipment is spelled out in minute detail in the regulations furnished by the United States to the Guard Unit, to which Major Daigneau belonged, by the National Guard Bureau. Everything done by Major Daigneau on the occasion of the flight in which the accident giving rise to this litigation occurred had to be done exactly "by the book" not only as to what was done, but as to the details and as to the manner and method of the accomplishment of the details.

The Code sections under Title 32, U. S. C. A., appended to this petition as Appendix 2 specify a control over the Alabama Air National Guard and Major Daigneau in his capacity as a member of the same in a manner and degree which cannot be denied. § 4 B (a) specifically includes all federally recognized members of the National Guard, **even though inactive** as coming within the purview of

Title 32, U. S. C. A., and the controls imposed therein. How then can it be argued that the United States should not be responsible for the damage caused by the negligence of Major Daigneau on the occasion complained of under the rule of respondeat superior prevailing in the law of Alabama, when he was completely dominated in his every movement by the National Guard Bureau, a Federal Agency, and when his every act was subject to the provisions of Title 32 of the United States Code Annotated?

It would unduly lengthen this petition and further burden the Court again to recite the many instances of supervision, direction and control over Major Daigneau by the United States through the National Guard Bureau on the occasion of the accident made the basis of the suit. Suffice it to say that they are manifold in number and appear frequently and continuously throughout the record in the testimony of all of the witnesses which appears therein, as well as in the form of the regulations of the United States Air Force and the National Guard Bureau, under which Major Daigneau had to operate. Coupled with the Federal Statutes set out in Title 32, U. S. C. A., which the District Court should have judicially recognized, and the facts which were undisputed on the trial, it is crystal clear that according to the Alabama interpretation of the law of agency, Major Daigneau, in the occasion complained of, was obviously an employee of the United States of America so as to impute and charge liability to the defendant according to the spirit and tenor of the Federal Tort Claims Act. From a practical standpoint, no experienced and efficient trial lawyer would ever attempt, in Alabama and under the law of that State, to defend a private individual or corporation under similar circumstances by a plea of non-agency. All of the factors which are necessary to hold the master liable for the acts of his servant under the Alabama version of the doctrine of respondeat superior were present in the relationship

between Major Daigneau and the United States on the occasion of the accident sued upon.

To summarize:

(1) The United States owned the aircraft piloted by Major Daigneau;

(2) The United States supplied the fuel for the operation of said aircraft;

(3) Major Daigneau had to pass a physical examination given by an Air Force Surgeon before his entrance into the National Guard;

(4) His training as a pilot in the Alabama Air National Guard, Major Daigneau was sent to United States Air Force schools at the expense of the Federal Government, and he was trained under the command of Air Force Officers;

(5) On the occasion of the accident Major Daigneau was occupying the dual status of an Alabama Air National Guardsman and an Air Force Reserve Officer, subject to the chain of command above him in both organizations;

(6) Major Daigneau was subject to being "fired" by the National Guard Bureau, by withdrawal of Federal recognition;

(7) On the occasion of the flight during which the accident occurred, Major Daigneau was engaged in proficiency training required by the United States through the National Guard Bureau;

(8) The training of Major Daigneau which was being accomplished on the occasion of the accident was for the benefit of the United States, in making him a more experienced and competent pilot for the National defense of this country;

(9) Before leaving Montgomery, Alabama, on the occasion of the accident, Major Daigneau was required to obtain clearance from Flight Service at Maxwell Field, an Air Force installation;

(10) In order to be eligible for flying pay, Major Daigneau had to engage upon proficiency flights, such as the one upon which he was embarked on the occasion of the accident made the basis of the suit;

(11) The pay received by Major Daigneau as an Alabama Air National Guardsman came to him from the United States, in the form of vouchers from an Air Force Installation at Dobbins Field, Georgia;

(12) On the occasion of the accident made the basis of the suit Major Daigneau, in his capacity as a member of the National Guard Bureau, was entitled to all the retirement and disability benefits provided for regular United States Air Force Officers of the same grade.

The Supreme Court of the United States has in **United States v. Yellow Cab Company**, supra, committed itself that the Federal Tort Claims Act should receive a liberal construction to enforce its benevolent purpose, and should not be emasculated by rigid interpretation.

In **Williams v. United States**, supra, and the other cases herein mentioned, the Court has held that in determining liability under the Federal Tort Claims Act, the responsibility of the United States must be measured by the same rules of the doctrine of respondeat superior as would apply to a private person in the State where the accident sued upon occurred. We have asked simply that the sovereign immunity of the Federal Government be waived in the instant case as the framers of the Federal Tort Claims Act intended, and that the law of Alabama as it applies to private individuals be allowed to rule.

The District Judge found that on the occasion of the accident giving rise to the case at bar that it might be inferred from the evidence that the proximate cause of the accident was the negligence of the pilot of the F-51 (R. p. 308). Both the District Court and the Court of Appeals, therefore, base their holding of non-liability on the part of the United States to the petitioners in this case **solely** on the finding that at the time of the accident in question the Alabama Air National Guard Unit, of which Major Daigneau was a member, had not been called into the active Federal service. We seek here to determine if such a harsh application of the Federal Tort Claims Act is to be condoned in instances where the undisputed proof shows that on the occasion of the accident sued for a National Guardsman, although not in the active service of the United States, is supervised and controlled by the Federal Government to the extent that the United States, if a private citizen, would be responsible for his acts.

Without meaning to be presumptuous, we feel that the Court of Appeals for the Fifth Circuit which so earnestly considered the question on the appeal below has, in the closing paragraph of its opinion, invited a review by this Court.

Wherefore, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in case numbered and entitled on its docket, No. 16,679, Storer Broadcasting Company, Detroit Fire & Marine Insurance Company and Associated Aviation Underwriters, Appellants, v. United States of America, Appellee, and that the said judgment of the United States Court of Appeals for the Fifth Circuit may be reversed by this Honorable

Court, and that your petitioners may have such other and further relief as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

Respectfully submitted,

STORER BROADCASTING COMPANY, DETROIT FIRE & MARINE INSURANCE COMPANY and ASSOCIATED AVIATION UNDERWRITERS,
Petitioners,

By ..... GEORGE W. YANCEY,
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Counsel for Petitioners.

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Birmingham 3, Alabama,
Of Counsel.

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon Counsel for the Respondent by mailing copies of the same, United States postage prepaid, to Honorable George Cochran Doub, Assistant Attorney General, Civil Division, United States Department of Justice, Washington, D. C., and Honorable W. L. Longshore, United States Attorney, United States District Court for the Northern District of Alabama, Birmingham, Alabama.

This the 29 day of March, 1958.

..... Counsel for Petitioners.

APPENDIX "A."

The Opinion Sought to Be Reviewed.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 16679.

Storer Broadcasting Company, Detroit Fire & Marine Insurance Company and Associated Aviation Underwriters,
Appellants,

versus

United States of America,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(January 9, 1958.)

Before Rives, Jones and Brown, Circuit Judges.

Per Curiam: The only question presented by this appeal is whether a member of the National Guard of a State, who is not a caretaker,[1] and who has not been called to active service of the United States is an "employee of the government" within the meaning of the Federal Tort Claims Act.[2] This Court is firmly committed to answer that question in the negative.[3] The

[1] See United States v. Holly, 10th Cir. 1951, 192 F. 2d 221, 223; Elmo v. United States, 5th Cir. 1952, 197 F. 2d 230; United States v. Duncan, 5th Cir. 1952, 197 F. 2d 233; Courtney v. United States, 2d Cir. 1956, 230 F. 2d 112.

[2] See particularly Sections 1346 (b), 2671 and 2674 of Title 28, United States Code.

[3] Dover v. United States, 5th Cir. 1951, 192 F. 2d 431; McCraine v. United States, 5th Cir. 1952, 199 F. 2d 581; Slagle v. United States, 5th Cir. 1957, 243 F. 2d 404.

Tenth Circuit is in accord.[4] The Third Circuit has held differently as to the District of Columbia National Guard.[5] but, as its opinion indicates, that holding is distinguishable because of the unique status occupied by the District of Columbia National Guard. Many district courts have held likewise.[6] Additionally, all located decisions on the state and federal-militia relationship hold that National Guardsmen of the several states are employees of the state except when in the actual service of the United States.[7]

In the face of such a formidable array of authorities, the appellants, with admirable industry, have developed

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[4] Williams v. United States, 10th Cir. 1951, 189 F. 2d 607.

[5] O'Toole v. United States, 3rd Cir. 1953, 206 F. 2d 912.

[6] Glasgow v. United States, D. C. Ala. 1951, 95 F. Supp. 213; Mackay v. United States, D. C. Conn. 1949, 88 F. Supp. 696; Satcher v. United States, D. C. S. C. 1952, 101 F. Supp. 919; Larkin v. United States, D. C. N. Y. 1952, 118 F. Supp. 435; Lederhouse v. United States, D. C. N. Y. 1954, 126 F. Supp. 217, reversed on a different ground, 230 F. 2d 112.

[7] United States ex rel. Gillett v. Dern, Secretary of War, C. A. D. C. 1934, 74 F. 2d 485; Baker v. State, N. C. 1931, 156 S. E. 917, 918; Gibson v. State, N. Y., 19 N. Y. S. 2d 405; State v. Johnson, Wis., 202 N. W. 191; People v. Hill, N. Y., 27 N. E. 789; People v. Bard, 209 N. Y. 304, 103 N. E. 140; Mauran v. Smith, R. I., 8 R. I. 192; Cutter v. Tole, Me., 2 Me. 181; State v. Harrison, Minn., 26 N. W. 729; State v. Newark, N. J., 29 N. J. Law 232; Houston v. Moore, 18 U. S. (5 Wheat.) 1; Spence v. State, N. Y., 288 N. Y. S. 1009; Blanco v. Austin, N. Y., 197 N. Y. S. 328, 204 App. Div. 34; Lind v. Nebraska National Guard, Neb., 12 N. W. 2d 652, 655; Worth v. Craven County, N. C., 24 S. E. 778; Chapin v. Ferry, Wash., 28 Pac. 754; State v. Wilson, N. H., 7 N. H. 543; Winslow v. Morton, 118 N. C. 486, 24 S. E. 417; State v. Mead, Wash., 100 Pac. 1033; Mathews v. Bowman, Me., 25 Me. 157; Hayes v. Palmer, N. H., 22 N. H. 94; McGorray v. Murphy, Ohio, 88 N. E. 881; State v. Johnson, Wis., 202 N. W. 191; Bush v. United States, 52 Ct. Cl. 199; People ex rel. Gillet v. DeLamater, N. Y., 287 N. Y. Supp. 979; Manley v. State, 62 Tex. Cr. R. 392, 137 S. W. 1137; Alabama Great So. R. Co. v. United States, 49 Ct. Cl. 522; Louisville R. Co. v. United States, 52 Ct. Cl. 259. See, also, 57 C. J. S., Militia, § 10, pp. 1086, 1087; 40 C. J., Militia, § 23, p. 671; 57 C. J. S., Militia, § 8-c, p. 1086; 40 C. J., Militia, § 17, pp. 669, 670.

an excellant record and now ask this Court to re-examine the question, insisting especially that in view of **United States v. Yellow Cab Co.**, 340 U. S. 543, a more liberal construction of the Act is now required.[8] If a proposition so firmly established is to be changed, we think that should be done only by the Supreme Court, and that we should abide by our former decisions.

The judgment is therefore

Affirmed.

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[8] A like insistence, also on a well-developed record and excellent briefs, is presented in United States v. Prager, No. 16,478, decided this day.

APPENDIX "B."

Resume of Statutes Involved, But Not Set Out in the Petition.

Title 32, U. S. C. A., Chapter 1, relates to the composition, organization and control generally of the Guard by the Federal Government, and, under § 4-B, defines the National Guard as meaning that portion of the Organized Militia of the several States, Territories and the District of Columbia, active and inactive, federally recognized as provided in the Act, and organized, armed, and equipped in whole or in part at Federal expense and officered and trained under paragraph 16, section 8, article 1 of the Constitution.

§ 5 of Chapter 1 provides for the organization of the individual tactical units of the National Guard, and sets forth that the President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State.

§ 6 of Chapter 1 sets up the location of units and headquarters.

§ 7 of Chapter 1 provides the method by which the location and designation of units of the National Guard comprised entirely within the limits of any State shall be determined by means of a Board of Commission.

§ 8 of Chapter 1 provides that the President of the United States may assign the National Guard of the several States and Territories to divisions, brigades, and other tactical units, and may detail officers either from the National Guard or the Regular Army to command such units.

§ 15 of Chapter 1 provides for an annual inspection by inspector generals and officers of the Regular Army to be made of the National Guard to determine whether the amount and condition of the property in the hands of the National Guard is satisfactory, whether the National

Guard is organized as prescribed by the sections enumerated, whether the officers and men possess the physical and other qualifications prescribed, and whether they are sufficiently armed, uniformed, equipped, and being trained and instructed for active duty in the field, and whether the records are being kept in accordance with the requirements of the Federal Law. This section also provides that the reports of the inspectors shall serve as a basis for deciding the issue as to the retention by the National Guard of the military property provided by law for their use, and determining what organizations and individuals shall be considered as constituting a part of the National Guard within the meaning of the Federal Statute.

§ 16 of Chapter 1 provides that no organization of the National Guard, members of which have received compensation under the provisions of the Federal Law shall be disbanded without the consent of the President, nor shall the strength of such an organization be reduced below the minimum that shall be prescribed by the President.

§ 17 of Chapter 1 provides that "**The President shall make all necessary rules and regulations and issue such orders as may be necessary for the thorough organization, discipline, and government of the militia provided for in this title.**" (Emphasis supplied.)

Chapter 2 of Title 32, U. S. C. A., provides for the funds for the support of the National Guard.

§ 24 of Chapter 2 provides that in the event any State refuses to comply with or enforce any requirement of the Federal Law, or any regulation promulgated thereunder and in aid thereof by the President or the Secretary of the Army, the National Guard of such State shall be debarred, wholly or in part, as the President may direct, from receiving any pecuniary or other aid, benefit, or privilege authorized or provided by the law. (Emphasis supplied.)

Chapter 3, Title 32, U. C. C. A., covers armament, equipment and supplies of the National Guard and prescribes in detail just how the arms, equipment and supplies shall be handled, and how their use shall be reported upon.

§ 31 of Chapter 3 provides that the National Guard shall as far as practicable, be uniformed, armed, and equipped with the same type of uniforms, arms, and equipments as are or shall be provided for the Regular Army.

Chapter 4, Title 32, U. S. C. A., deals with instructions, training and discipline of the National Guard.

§ 61 of Chapter 4 specifies that the discipline of the National Guard (which includes training) shall conform to the system which is or may be prescribed for the Regular Army, and the training shall be carried out by the several States, Territories, and the District of Columbia so as to conform to the provisions of the title.

§ 64 of Chapter 4 makes provision for assemblages for instruction of officers and enlisted men. It is stipulated that "under such regulations as the President may prescribe, the Secretary of the Army may provide for assemblages of officers, warrant officers, and enlisted men of the National Guard for the purpose of attending schools to be conducted by officers of the Regular Army detailed by the Secretary of the Army for that purpose."

§ 66 of Chapter 4 provides that for instruction of the National Guard, the President shall assign such number of officers of the Regular Army as he may deem necessary; also such number of enlisted men of the Regular Army for duty in the instruction of the National Guard as may be deemed necessary.

Chapter 7, Title 32, U. S. C. A., deals with commissioned officers of the National Guard.

§ 111 of Chapter 7 specifies the qualifications for officers of the National Guard and sets up that they shall not be recognized as officers of the National Guard unless they are

selected from the classes designated and shall have taken the oath prescribed in § 112.

§ 112 of Chapter 7 specifies the oath required of commissioned officers, and states in part: "I do solemnly swear * * * that I will obey the orders of the President of the United States * * *."

§ 113 of Chapter 7 provides for the examinations of officers desiring commissions and specifies that the provisions of the Title shall not apply to any person appointed an officer of the National Guard unless he first shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall prescribe. It further provides that the examination for qualification shall be conducted by a board of three commissioned officers appointed by the Secretary of the Army from the Regular Army or the National Guard of the United States, or both. It also provides that the examination must be held prior to the original appointment.

§ 114 of Chapter 7 provides for the elimination and disposition of officers of the National Guard of the United States, and states that when Federal recognition is withdrawn from any officer as provided for in § 115, which follows, he shall then cease to be a member of the National Guard of the United States, and shall be given a discharge certificate.

§ 115 of Chapter 7 provides for the withdrawal of Federal recognition and sets up the method by which it may be accomplished.

Chapter 10, Title 32, U. S. C. A., provides for pay and allowances for both officers and enlisted men in the National Guard.

Chapter 11, Title 32, U. S. C. A., provides for the establishment of the National Guard Bureau, to which the President shall assign such officers of the Regular Army for duty as he may deem necessary.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 888

STORER BROADCASTING COMPANY, DETROIT FIRE & MARINE INSURANCE COMPANY AND ASSOCIATED AVIATION UNDERWRITERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Northern District of Alabama, Southern Division, rendered no opinion. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 37–39) is reported at 251 F. 2d 268.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1958. The petition for a writ of certiorari was filed on April 2, 1958. The jurisdiction of this Court is presumably invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a member of the Air National Guard of the State of Alabama who has not been ordered into active federal service is an "employee" of the United States, as defined in the Federal Tort Claims Act, so as to make the United States liable for his negligence.

STATUTES INVOLVED

The pertinent sections of the Federal Tort Claims Act, as codified in Title 28, U. S. C., provide:

§ 1346. United States as defendant.

* * * * *

(b) * * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 2671. Definitions.

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the

United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

STATEMENT

Petitioners instituted this Federal Tort Claims Act suit against the United States in the District Court for the Northern District of Alabama, seeking to recover for property damages allegedly caused by the negligence of a member of the Air National Guard of the State of Alabama (R. 1-2). This property damage resulted from a collision, on February 5, 1954, between a DeHaviland Dove aircraft owned by the Storer Broadcasting Company and an F-51 aircraft loaned to the Alabama Air National Guard by the Department of the Air Force pursuant to the applicable provisions of law (R. 302, 307).

The F-51, operated by Major Stuart H. Daigneau on a training mission for the Alabama Air National Guard, skidded off the runway on landing at Birmingham Municipal Airport and collided with the DeHaviland Dove, which was parked about 100 feet from the landing strip (R. 307). There was no evidence showing either a mechanical defect in the plane

or unusual atmospheric conditions (R. 308). The District Court observed that "thus it might be inferred" that the accident occurred because of Daigneau's negligence (R. 308). Daigneau "had a full-time civilian occupation" and "was not a regular member of the United States Air Force" (R. 308). Neither he nor the Alabama Air National Guard were in active federal service at the time of the accident (R. 308).

The District Court concluded that, while the United States owned the F-51, it did not maintain, control, or operate it at the time of the accident (R. 308–309). The court further ruled that Daigneau, who was on a training mission for the Alabama Air National Guard at the time of the accident, was not an employee of the United States for the purposes of the Federal Tort Claims Act (*ibid.*). Judgment was accordingly entered for the United States (R. 309–310).

The Court of Appeals unanimously affirmed, holding—on the basis of "a formidable array" of over thirty decided cases—that members of a state National Guard unit, who have not been called into active federal service, are not federal employees within the meaning of the Federal Tort Claims Act (Pet. App. 37–39).

ARGUMENT

The issue presented by this case is, as petitioners acknowledge (Pet. 2), the same as the basic issue raised by the petition in *Prager, et al.* v. *United*

States, No. 866, this Term. Our *Prager* brief in opposition, to which we respectfully refer the Court, reviews the constitutional and statutory relationship between the state National Guards and the United States and shows that members of the National Guard are only to be considered in the active service of the United States when ordered thereto in accordance with law and that at all other times National Guard personnel are state employees.[1]

Nevertheless, as in *Prager*, petitioners attempt to distinguish the present case and *Prager* from the many earlier cases presenting the same issue on the ground that only in the present cases is there evidence showing supervision and control in the United States over the allegedly negligent National Guardsmen (Pet. 23–24). While we recognize that an important factor, in determining whether or not an individual is an employee of the United States for the purpose of imposing liability under the Federal Tort Claims Act, is the authority of the United States to direct and control the individual in the performance of the act or omission which caused the injury, *e. g.*, *Harris* v. *Boreham*, 233 F. 2d 110 (C. A. 3), the record in this

[1] It should be noted that the provisions of Title 32 of the United States Code, which were cited in that brief, refer only to the relationship between the Army and the National Guard. However, these provisions (Pet. App. 40–43) were made applicable to the Air National Guard by Transfer Order No. 10, dated April 27, 1948, 13 F. R. 2428 (May 6, 1948), which implemented 61 Stat. 503 (1947), 5 U. S. C. 626 (f), and 61 Stat. 504 (1947), as amended, 5 U. S. C. 626c (e).

case clearly fails to establish such authority.[2] To the contrary, the evidence underscores the correctness of the District Court's findings that the pilot and plane involved here were under the control and direction of the Alabama Air National Guard, not the United States. The record shows that the pilot of the F-51 was a member of the Alabama Air National Guard (R. 84, 87, 97);[3] that the planes used by the Alabama Air National Guard were inspected, serviced, and maintained by it (R. 186, 189, 244); that the Alabama National Guard had complete and exclusive command authority over its personnel and equipment (R. 96, 100, 115, 162, 167, 302); that the Alabama Air National Guard had not been called into active federal

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[2] Admittedly, whether an employee of the Government is acting within the scope of his employment must be resolved on the basis of the *respondeat superior* law of the place where the act or omission occurred. 28 U. S. C. 1346 (b); *Williams* v. *United States*, 350 U. S. 857. On the other hand, as the Second Circuit has held in *Courtney* v. *United States*, 230 F. 2d 112, the threshold question of whether a person is an "employee of the government" as defined in 28 U. S. C. 2671 depends solely on federal law. In any event, even if reference to state law were appropriate to determine whose employee a guardsman is, the Alabama cases cited by petitioners (Pet. 27-28) apply the usual right of control test and fully support the result reached by the courts below.

[3] Contrary to the statement in petitioners' brief (Pet. 33), Major Daigneau ceased to be a member of the Air Force Reserve when he became a member of the Alabama Air National Guard (R. 97-99). As a member of the Alabama Air National Guard, Major Daigneau was also in the Reserve of the Air Force since both the Air National Guard of the United States and the Air Force Reserve are reserve components of the Air Force. 50 U. S. C. 1091. Memberships in these two reserve components are mutually exclusive. 50 U. S. C. 1115.

service at the time of the accident (R. 13, 83–85, 195); that the United States Air Force did not have any command authority over the flight operations of the Alabama Air National Guard (R. 108, 198, 200, 271); and that the flight which resulted in the accident was authorized and ordered by the Alabama Air National Guard (R. 198, 200, 298–301).

There is also no substance to petitioners' assertion of a conflict (Pet. 2, 25) with *O'Toole* v. *United States*, 206 F. 2d 912 (C. A. 3), where it was held that a member of the District of Columbia National Guard, though not called to active duty, was a federal employee for the purpose of imposing liability on the United States under the Federal Tort Claims Act. The Third Circuit in that case emphasized the fact that the control and command over the District of Columbia guardsmen at all times ran from the President and that control by the District of Columbia is lacking. The court noted specifically that the President, not the District Commissioners, exercises the powers of commander-in-chief, that the President appoints guard officers and courts martial, and that only the President has the right to call out the guard to suppress a riot or otherwise meet an emergency. In all these respects, the District of Columbia National Guard is unique because the President has the control which the governors of the various states exercise over the state National Guards. And as we have shown, *supra*, the record shows clearly that here Alabama officials exercised full control and supervision over the guardsman involved.

CONCLUSION

For these reasons, as well as those stated in our brief in opposition in *Prager* v. *United States*, *supra*, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1958.